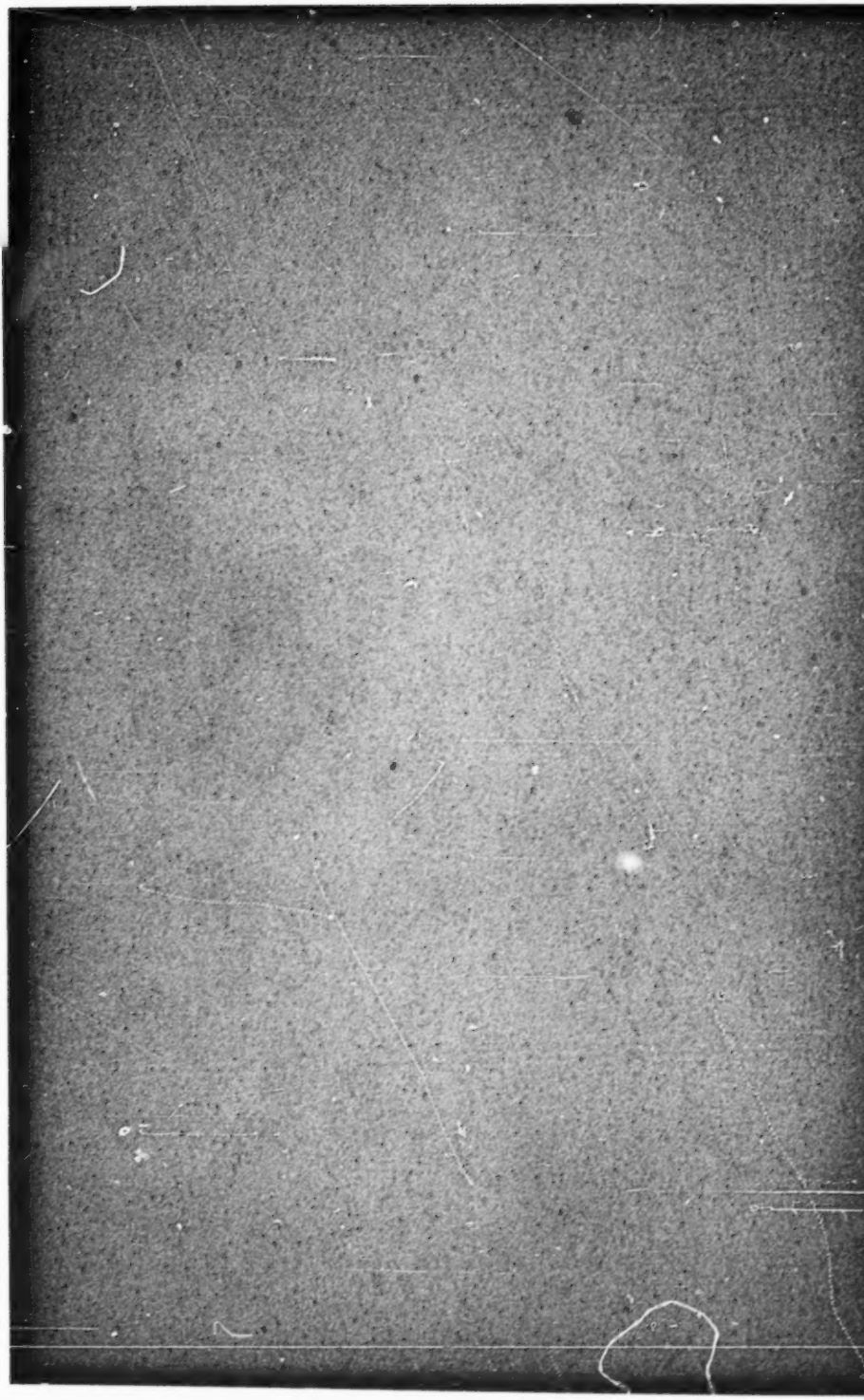


IN THE

Supreme Court of the United States

October Term, 1974

No. 74-39

B. M. OLDER,

Petitioner,

v.

HERBERT D. JR., and ORLENE J. FOSS, et al.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal in the State of California, First Appellate District

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SUBJECT INDEX

	Page
Statement of the Case	1
Argument Against Granting the Writ	4
Conclusion	6

TABLE OF AUTHORITIES CITED

Cases

Burger v. United States, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921)	4
Cano v. Tyrrell, 256 Cal. App. 2d 824, 64 Cal. Rptr. 522 (1967)	5
Cardinale v. Louisian, 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969)	4
Lau Ow Bew v. United States, 144 U.S. 47, 36 L. Ed. 340, 12 S. Ct. 517 (1892)	6
Murchison, In re, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1954)	4
Offut v. United States, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954)	4
Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 57 S. Ct. 43, 67 L. Ed. 157 (1937)	5
Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1926)	4

Statutes

California Code of Civil Procedure, Sec. 284	2
California Evidence Code, Sec. 1152	5
United States Code, Title 28, Sec. 1257(3)	4
United States Constitution, Fourteenth Amendment	3, 4

IN THE

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B. M. OLDEN,

Petitioner,

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HERBERT D., JR., and ORLENE J. FOSS, *et al.*,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal in the State of California, Second Appellate District

Respondents Herbert D., Jr. and Orlene J. Foss, Elton E. Miller, Jr., and Cecelia J. Miller, William A. Scott and John A. Lighty and Frances Mary Lighty, respectfully pray that the Petition for Writ of Certiorari be denied to Petitioner.

Statement of the Case

This case involves damage to homes resulting from land fill subsidence. Trial court liability was based on a failure of certain parties to disclose that the homes were built on fill ground. The judgment of the Court in favor of Respondents and against Petitioner and others was entered on April 9, 1969 in the aggregate sum of $97,542.62, including costs and interest to date of judgment.

The only factual dispute material to the Petition for Writ of Certiorari relates to the circumstances surrounding a substitution of attorneys. In 1968, Respondents sought to accomplish a substitution of attorneys. The reluctance of Respondents' original counsel to step aside necessitated an *ex parte* motion. The motion was heard on February 9, 1968. [RT 115.] The California Code of Civil Procedure, § 284, did not, at that time, nor does it now, require notice to be given to opposing counsel of such a motion; however, in accordance with local practice, Respondents' present counsel telephonically advised Petitioner's counsel of the pending motion. The petition omits any mention of that phone call and of the fact that the moving papers were filed with the Clerk of the Court, thereby becoming of public record. In fact the petition strongly implies that there was no notice.

Attached to the motion was a letter from Respondents' original counsel herein in which said counsel indicated that negotiation settlements were in process and had "tentatively reached the figure of $20,000.00." The letter was submitted not for the purpose of bringing the passing reference to settlement to the attention of the trier of fact, but to establish the difficulties Respondents' new counsel was experiencing with former counsel and to compel former counsel to produce documents sorely needed by Respondents in the prosecution of their action. The judge received the letter solely for purpose of the motion for substitution and emphatically stated that he had at no time used the letter as an

element in determining either liability or extent of damages.

Petitioner appealed the entire case to the Court of Appeal of the State of California. One of the errors asserted on appeal was a claim of material prejudice relating to the letter which was appended to the moving papers in support of the motion for substitution of attorney. The Court of Appeal rejected that claim of error as being totally without merit. [Petition, Appendix A, p. 14.] On May 1, 1974, the Supreme Court of the State of California denied a hearing on this matter. [Petition, Appendix A, p. 16.]

At no time during the state trial or appellate proceedings did Petitioner rely on the provisions of the 14th Amendment of the Constitution of the United States or any Federal treaty or regulation. Petitioner's arguments were based solely on California law and were decided solely on that basis.

ARGUMENT AGAINST GRANTING THE WRIT

1. By failing to raise the 14th Amendment due process argument at any stage of the state court proceedings, Petitioner has waived any such claim and cannot now urge the due process claim as a basis for granting a writ. (*Cardinale v. Louisian,* 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969).)

2. This case does not present a substantial federal question to support jurisdiction under 28 U.S.C. 1257 (3). Petitioner lists the following landmark cases on bias, none of which are relevant to the instant case: (1) *Tumey v. Ohio,* 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1926) (a criminal case in which the judge who heard the matter was the mayor of a small municipality which depended in large part financially upon the revenues generated by fines. Bias was found in the fact that the hearing judge had a definite, although not personal, financial interest in the outcome of the case); (2) *Burger v. United States,* 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921), (a criminal case in which the judge was openly prejudiced against Germans and Americans of German ancestry, openly avowing such in the courtroom, when the defendants were either natives of Germany or American of German ancestry. The court held that such an opinion and such hostility effectively destroyed any pretense of due process); (3) *In re Murchison,* 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1954); (4) *Offut v. United States,* 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954), (criminal cases involving contempt citations); and (5)

Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 57 S. Ct. 43, 67 L. Ed. 157 (1937), (a rate-setting and roll back case in which the Commission explicitly and directly relied on evidence which it deliberately kept hidden from the Petitioner). The brief synopsis of the cases cited by Petitioner show their inapplicability to the case under consideration. Can it seriously be urged that *one* sentence in a three paragraph letter referring to a nuisance value settlement, which the judge stated in open court had no bearing on his decision [R.T. 3433], evidences the existence of elements of prejudice and bias similar to the prejudice found to exist in the cases cited by Petitioner?

Petitioner's argument that the reference to settlement was error is premised on California Evidence Code § 1152, which precludes the admission of evidence of settlement disputes in light of the potentially unmerited weight which a jury of laymen might give such evidence. The California Court of Appeals has concluded that when evidence is so admitted in a case tried to a judge as trier of fact, there is no error where the trial judge has "voluntarily remarked that since there was no jury he would disregard any evidence of an offer to compromise." *Cano v. Tyrrell,* 256 Cal. App. 2d 824, 834, 64 Cal. Rptr. 522, 528 (1967).

Conclusion

The function of this Court historically has been the examination of Federal questions of importance, not minor questions of State law. *Lau Ow Bew v. United States*, 144 U.S. 47, 36 L. Ed. 340, 12 S. Ct. 517 (1892). Petitioner has sought to invoke the jurisdiction of this Court by using an argument not raised in the lower courts, and one presenting neither a material nor a substantial issue.

It is therefore respectfully submitted that the prayed for writ of certiorari should not be issued.

Respectfully submitted,

SAMUEL C. PALMER III,
Attorney for Respondents.

GIBSON & PALMER,
Of Counsel.